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THE SOCIAL SECURITY COMMISSIONERS

SOCIAL SECURITY ADMINISTRATION ACT 1992
SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS ACT 1992
SOCIAL SECURITY ACT 1998

Commissioner's Case Nos.: CDLA/2751/2003
CDLA/3567/2003
CDLA/3725/2003

APPEALS FROM DECISIONS OF APPEAL TRIBUNALS
ON QUESTIONS OF LAW

DECISIONS OF THE TRIBUNAL OF SOCIAL SECURITY COMMISSIONERS

THE CHIEF COMMISSIONER
MR COMMISSIONER ROWLAND
MR COMMISSIONER ANGUS

Claimant:	**Mr Samer Sallah**
Tribunal:	**Sutton**
Tribunal Date:	**6 December 2002**
Tribunal Register No:	**U/45/176/2002/03286**

Claimant:	**Mrs Ann Flynn**
Tribunal:	**Boston**
Tribunal Date:	**13 June 2003**
Tribunal Register No:	**U/42/030/2002/00476**

Claimant:	**Mr Alun Leonard Murphy**
Tribunal:	**Cardiff**
Tribunal Date:	**23 July 2003**
Tribunal Register No:	**U/03/188/2003/02179**

CDLA/2751/2003
CDLA/3567/2003
CDLA/3725/2003

DECISIONS OF THE TRIBUNAL OF SOCIAL SECURITY COMMISSIONERS

1. (a) On file CDLA/2751/2003, we allow the claimant's appeal, set aside the decision of the Sutton appeal tribunal dated 6 December 2002 and refer the case to a differently constituted appeal tribunal for determination.

(b) On file CDLA/3567/2003, we dismiss the claimant's appeal against the decision of the Boston appeal tribunal dated 13 June 2003.

(c) On file CDLA/3725/2003, we allow the claimant's appeal, set aside the decision of the Cardiff appeal tribunal dated 23 July 2003 and substitute for the tribunal's decision our decision that the claimant is entitled to the middle rate of the care component and the higher rate of the mobility component of disability living allowance from 25 April 2003 to 5 May 2003.

REASONS

2. These three appeals all arise out of renewal claims for disability living allowance made in advance under regulation 13C of the Social Security (Claims and Payments) Regulations 1987. Between them, they raise two questions of general importance. Firstly, on an appeal against a decision made prospectively by the Secretary of State, is the tribunal precluded by section 12(8)(b) of the Social Security Act 1998 from taking account of changes of circumstances occurring between the date of the Secretary of State's decision and the renewal date ? This question arises in the third appeal before us, where the tribunal declined to take account of the actual consequences of the claimant having had part of his leg amputated between the date on which the Secretary of State awarded benefit and the renewal date from which the award was effective, although they did take account of those consequences that they considered could reasonably have been anticipated at the time of the Secretary of State's decision. Secondly, does the Secretary of State have power to disallow a claim prospectively, as he did in each of the first two appeals before us ? At the hearing before us, the appellants were represented by Mr Stewart Wright of the Child Poverty Action Group and the Secretary of State was represented by Mr David Forsdick of Counsel, instructed by the Solicitor to the Department of Health and the Department for Work and Pensions.

The legislation

3. Regulation 13C of the 1987 Regulations is in the following terms:

"(1) A person entitled to an award of disability living allowance may make a further claim for disability living allowance during the period of 6 months immediately before the existing award expires.

(2) Where a person makes a claim in accordance with paragraph (1) the Secretary of State may –

(a) treat the claim as if made on the first day after the expiry of the existing award ("the renewal date"); and
(b) award benefit accordingly, subject to the condition that the person satisfies the requirements for entitlement on the renewal date.

(3) A decision pursuant to paragraph 2(b) to award benefit may be revised under section 9 of the Social Security Act 1998 if the requirements for entitlement are found not to have been satisfied on the renewal date."

4. Section 12(8)(b) of the 1998 Act must be read in the light of sections 8, 9, 10 and 12(1) and (2). Section 8(1) places on the Secretary of State the responsibility for deciding claims and subsection (2) provides:

" (2) Where at any time a claim for a relevant benefit is decided by the Secretary of State –
(a) the claim shall not be regarded as subsisting after that time; and
(b) accordingly, the claimant shall not (without making a further claim) be entitled to the benefit on the basis of circumstances not obtaining at that time.

5. Section 9 provides for the revision by the Secretary of State of decisions he has made. The grounds upon which a decision may be revised are mostly set out in regulation 3 of the Social Security and Child Support (Decisions and Appeals) Regulations 1999. It is necessary here to note only that, where an application for revision is made within a month (or such further time as may be allowed under regulation 3 or 4) of a decision being issued, the original decision may be revised on any ground under regulation 3(1) but that, by virtue of regulation 3(9)(a), regulation 3(1) does not apply in respect of a change of circumstances which has occurred since the original decision was made. By virtue of section 9(3), a revision usually has effect from the same date as the decision that has been revised.

6. Section 10 provides for the supersession by the Secretary of State of a decision of the Secretary of State, a tribunal or a Commissioner and regulation 6 of the 1999 Regulations provides that grounds for supersession include a change of circumstances since the decision was made. By virtue of section 10(5), a supersession usually takes effect from the date of the application for supersession or, if the supersession was on the Secretary of State's own initiative, from the date of the supersession itself.

7. Section 12(1) and (2) provides for an appeal to an appeal tribunal against any decision under sections 8 or 10. Section 12(8)(b), which is the provision at the heart of this issue, provides:

"(8) In deciding an appeal under this section, an appeal tribunal –
(a) …; and
(b) shall not take into account any circumstances not obtaining at the time when the decision appealed against was made."

8. Sections 8(2)(a) and 12(8)(b) were clearly enacted to reverse R(S) 1/83 and R(S) 2/98 in which it had been held that a claim for benefit was to be regarded as subsisting until any appeal against a disallowance had been determined, so that the tribunal could take account of any changes of circumstances down to the date of their decision. Section 8(2)(b) makes

explicit the consequence for the Secretary of State's own power to make decisions, which is that he too is unable to have regard to any circumstances that he may anticipate will occur after the date of his decision. It is well established that, while an award of benefit subsists for the period in respect of which it is made even if all or part of that period is after the date of the decision, a disallowance does not, in the absence of express statutory provision to the contrary, subsist after the date of the decision. Therefore, if there is a change of circumstances after a prospective claim has been disallowed, it is open to the claimant to make a new claim (see R(S) 5/80 at paragraph 25) whereas, if there is a change of circumstances after an award has been made, the award may be superseded, either on the claimant's application or on the Secretary of State's own initiative. The intention of the change wrought by sections 8(2) and 12(8)(b) is presumably that the Secretary of State should be able consider the implication of a change of circumstances before a tribunal does, even where that makes for less efficient decision-making.

9. The 1998 Act replaced Part II of the Social Security Administration Act 1992, which dealt with adjudication. Part I of the 1992 Act, which deals with claims, payments and the general administration of benefit, is still in force and includes section 5(1), which contains the regulation-making powers under which regulation 13C is made. So far as is material, section 5(1) provides:

> "(1) Regulations may provide –
> (a) for requiring a claim for benefit to which this section applies to be made by such a person, in such manner and within such time as may be prescribed;
> (b) for treating such a claim as made in such circumstances as may be prescribed as having been made at such date earlier or later than that at which it is made as may be prescribed;
> (c) for permitting such a claim to be made, or treated as made, for a period wholly or partly after the date on which it is made;
> (d) for permitting an award on such a claim to be made for such a period subject to the condition that the claimant satisfies the requirements for entitlement when benefit becomes payable under the award;
> (e) for any such award to be revised under section 9 of the Social Security Act 1998, or superseded under section 10 of that Act, if any of those requirements are found not to have been satisfied;
> (f) for the disallowance on any ground of a person's claim for a benefit to which this section applies to be treated as a disallowance of any further claim by that person for that benefit until the grounds for the disallowance have ceased to exist;
> ..."

The first issue

10. Both Mr Wright and Mr Forsdick argued that section 12(8)(b) of the 1998 Act cannot operate on an appeal against a decision made prospectively and that a tribunal is therefore entitled to have regard to changes in circumstances occurring between the date of decision and the renewal date. A fundamental part of their submissions was the assertion that a decision made prospectively on a renewal claim requires a prediction as to what the claimant's circumstances will be on the renewal date. In support of his submission, Mr Wright relied on CDLA/3848/01. In paragraph 14 of that decision, the learned Commissioner said:

"14. In my judgment it is implicit in Reg. 13C of the 1987 Regulations that circumstances occurring between the date of a decision on a renewal claim and the renewal date can (and therefore must) be taken into account by an appeal tribunal. My reasons are these:

(1) Where, under Reg. 13C(2)(a), the claim is treated as if made on the renewal date, what appears to have been the rationale behind s.12(8)(b) is removed.

(a) Reg. 13C(2)(a) is on the face of it a somewhat strange provision, as it appears to envisage a decision being made before the date on which the claim is treated as being made. The explanation for the introduction (by an amendment to the 1987 Regulations made in 1992) of that somewhat strange concept may have been the desire to avoid the effect of s.30(12) of the Social Security Administration Act 1992. That provided that, where a claim for a disability living allowance in respect of a person already awarded such an allowance was made or treated as made during the period for which he had been awarded such an allowance, it was required to be treated as an application for a review. But whatever the precise reason for s.13C(2)(a), its language is clear.

(b) S.12(8)(b) of the 1998 Act follows logically from s.8(2) of that Act. The old down to the date of hearing rule for appeal tribunals, as analysed by the tribunal of Commissioners in R(S) 2/98, was based on the continued existence of the claim. If the claim does not continue to exist after a decision on it, the basis for the down to the date of hearing rule is undermined: see R(DLA) 3/01 at paras. 20 to 24.

(c) However, where on a renewal claim the claim is not treated as made until the renewal date, s.8(2) cannot apply – the claim is expressly treated as subsisting after the date of the decision on it. S.12(8)(b) is therefore inappropriate.

(2) Reg. 13C(2), having stated that the Secretary of State may treat the claim as if made on the renewal date, goes on to provide that he may "award benefit accordingly." That means that the task of a decision maker (and appeal tribunal on appeal) is to determine whether the conditions for disability living allowance will be (or were) satisfied on the renewal date. It is in my view implicit that circumstances which occur between the date of the decision maker's decision and the renewal date can be taken into account by an appeal tribunal. It cannot have been the intention of s.12(8)(b) and Reg 13C, read together, that an appeal tribunal is prevented from taking into account changes in circumstances relevant to the very issue which it has to decide. If it were to ignore such changes, the effect of its decision would not be to "award benefit accordingly" (i.e. on the basis of a claim treated as made on the renewal date).

(3) Reg. 13C(2)(b) provides that any award by the Secretary of State on a renewal claim is "subject to the condition that the person satisfies the requirements for entitlement on the renewal date". It is in my judgment implicit in that provision

that if it is apparent to an appeal tribunal that, owing to an improvement in the claimant's condition after the date of a decision maker's decision awarding benefit on a renewal claim, the claimant will not (or did not) at the renewal date satisfy the entitlement conditions, the tribunal should, notwithstanding s.12(8)(b), disallow the renewal claim. S.12(8)(b) does not oblige the tribunal to uphold the award and leave it to the Secretary of State then to seek to overcome the technical difficulties which he would appear to face on a subsequent attempt to revise or supersede the tribunal's decision. If that is correct, the appeal tribunal must equally be entitled to take account of deterioration in the Claimant's condition after the date of the decision appealed against.

(4) It may be objected that s.12(8)(b) was enacted after Reg.13C, and is in unqualified terms. However, my task is to determine the meaning of the provisions as a whole, which I have sought to do above. I draw some comfort from the fact that there is at least one other apparently unqualified provision of the current adjudication legislation to which Reg. 13C provides an exception (although I accept more clearly so). Reg. 13(9) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 provides in unqualified terms that a decision by the Secretary of State cannot be revised by reason of a change of circumstances which occurred after the decision was made. Yet Reg. 13C(3) expressly provides to the contrary in the case of a renewal claim."

11. Mr Wright referred us to two decisions in which that approach had been applied by other Commissioners but he acknowledged that, in C12/03-04(DLA), Mrs Commissioner Brown, considering indistinguishable provisions in Northern Ireland legislation, declined to follow CDLA/3848/01. She said:

"38. ... At paragraph 14(3) of the decision the reasoning appears to ignore the provisions of section 5(1)(e) and regulation 13C(3) to the effect that a conditional award can be superseded or revised on the basis that the conditions are not met at the date of the coming into effect of that award, i.e. the renewal date. There was no need for any "implicit" provision to that effect in regulation 13C(2)(b). There was an express power to revise in regulation 13C(3). If it was not envisaged that such supersession or revision would take place and that there be an existing decision to be superseded or revised, these provisions appear pointless. I do not think they are. That being so it does not appear to me that the implication which the Commissioner reads into regulation 13C(2)(b) is necessary. The Secretary of State is permitted to revise or supersede the award if the conditions of entitlement are not met at the renewal date. That being so I fail to see why there is any implication in regulation 13C(2)(b) of an exception to Article 9(2) or Article 13(8)(b) [of the Social Security (Northern Ireland) Order 1998, equivalent to sections 8(2) and 12(8)(b) respectively of the 1998 Act.] ...

"39. It also appears to me that had the legislature desired to create an exception to Article 13(8)(b) it would have expressly done so rather than leaving it to be implied from a regulation. There is simply no power in the primary legislation enabling the tribunal to take into consideration circumstances not obtaining at the date of decision save for the very limited exception permitted by section 5(1)."

12. Mr Forsdick rightly conceded that the fourth of the points made in paragraph 14 of CDLA/3848/01 was not a good one, partly because the power to revise conferred by regulation 13C(3) is independent of the power conferred by regulation 3(1) of the 1999 Regulations and so is not affected by regulation 3(9)(a) of the 1999 Regulations (see CIB/4751/02 et al., at paragraphs 106 and 107), but more fundamentally because as Mrs Commissioner Brown had indicated, the scope of primary legislation is not generally determined by subordinate legislation that is not made expressly for that purpose. However, he submitted that CDLA/3848/01 was correctly decided in other respects. He responded to Mrs Commissioner Brown's points by arguing that, for the reasons given in CDLA/3848/01, section 12(8)(b) of the 1998 Act simply could not work in the context of a claim made and decided in advance and so it had to be read as being subject to section 5(1) of the Social Security Administration Act 1992 Act on the principle that, in the absence of any contrary indication, a general provision must be read as being subject to a provision dealing with particular circumstances that apply in the particular case being considered.

13. Despite the arguments of both Mr Wright and Mr Forsdick, we agree with Mrs Commissioner Brown on this issue. We do not see any conflict between, on one hand, sections 8(2) and 12(8)(b) of the 1998 Act and, on the other hand, section 5 of the 1992 Act and regulation 13C. Effect can, and therefore must, be given to the provisions of the 1998 Act in the context of renewal claims. In our judgment, CDLA/3848/01 was wrongly decided and should no longer be followed.

14. As regards the first reason given in paragraph 14 of CDLA/3848/01, it was common ground before us that it does not follow from the fact that a renewal claim is treated under regulation 13C(2)(a) as made on the renewal date that the decision on the claim cannot be made until the renewal date. We agree with that proposition, because it is obvious that the whole point of permitting advance claims is to permit advance determinations and so avoid any gap in a claimant's entitlement if a further award is to be made. That being so, we cannot accept the learned Commissioner's view that regulation 13C(2)(a) necessarily has the effect that a claim is treated as subsisting until the renewal date. It may have had that effect before section 8(2) of the 1998 Act came into force but section 8(2)(a) provides expressly that a claim ceases to subsist when the decision is made. We see no reason why that should not apply in the case of a decision made prospectively just as it applies in any other case. If the claim is replaced by an award, it is that award that subsists after the date of the decision, even if the award does not take effect until a later date. If the claim is replaced by a disallowance, nothing subsists after the date of the decision.

15. We also do not accept that the fact that regulation 13C(2)(b) provides that benefit is to be awarded "accordingly" means that the Secretary of State must determine whether the conditions for entitlement will be satisfied on the renewal date by predicting what the extent of the claimant's disablement will be on the renewal date. Again, that may have been the case before section 8(2) of the 1998 Act came into force but the express effect of section 8(2)(b) is that any decision made on a renewal claim cannot take account of circumstances not obtaining at the date of the decision. That precludes prediction.

16. Although at first sight regulation 13C(2)(b) may appear to provide a power to make an award, that is not so. Regulation 13C can best be understood by looking at the enabling provisions in section 5 of the 1992 Act. Section 5(1)(c) authorises the making of a regulation

that permits a claim to be made in advance. Section 5(1)(d) authorises the making of a regulation that permits an award on such a claim to be made subject to a condition. It does not authorise the making of a regulation that permits an award to be made in advance because it is unnecessary to do so. The power to make an award follows from the duty to determine a claim, imposed on the Secretary of State by sections 1 and 8(1) of the 1998 Act. One can see that regulation 13C(1) is made under section 5(1)(c), regulation 13C(2)(a) is made under section 5(1)(b), regulation 13C(2)(b) is made under section 5(1)(d) and regulation 13C(3) is made under section 5(1)(e). Thus, what regulation 13C(2)(b) permits is not the making of an award in the light of the prospective claim but the imposition of a condition on the award that is required to be made by the 1998 Act. The word "accordingly" therefore means no more than "on that claim" and its only significance is that it links paragraph (2)(b) with paragraphs (1) and (2)(a) so that, in conformity with the enabling provision (giving effect to the word "such" in both places where it occurs in section 5(1)(d)), the condition may be imposed only on an award made on a renewal claim made in advance and treated as made on the renewal date.

17. As regards the third reason given in paragraph 14 of CDLA/3848/01, we do not accept that the fact that an award on an advance claim is made conditional on the claimant's circumstances at the renewal date implies that a tribunal considering an appeal against the award may consider the claimant's circumstances at the renewal date where those circumstances were not obtaining at the time of the decision, contrary to the express prohibition in section 12(8)(b). As Mrs Commissioner Brown observed, express provision for revision is made in regulation 13C(3) so that there is another method of altering the Secretary of State's decision where there is a change of circumstances between the date of decision and the renewal date. Indeed, there is more than one other method, because there is also the power to supersede. We accept Mr Forsdick's submission that the language of regulation 13C(3) shows that it applies only where the original decision turns out to have been too favourable to the claimant. Regulation 13C(3) exists because the Secretary of State will be able to show that the conditions of entitlement were not met at the renewal date only after that date has passed. Having the power to revise ensures, by virtue of section 9(3) of the 1998 Act, that the revision is effective from the renewal date, whereas a supersession adverse to a claimant would usually be effective only from the date of the supersession. Where a claimant's condition deteriorates so that by the renewal date he or she satisfies the conditions for a higher award, supersession under section 10 is necessary. As in any other case, the claimant may lose benefit if the change in circumstances is not reported promptly but, unlike revision under regulation 13C(3), supersession, whether favourable or adverse to the claimant, may take place before the renewal date where the change of circumstances has taken place by the date of supersession.

18. Finally, we do not accept Mr Forsdick's additional submission that section 12(8)(b) of the 1998 Act must be read as being subject to section 5 of the 1992 Act, because we reject his premise that the provisions are in conflict. There is only a conflict if he and Mr Wright are correct in assuming that determining a claim in advance necessarily, as a matter of practicalities, requires the Secretary of State to take account of anticipated changes of circumstances in order to make a prediction as to what the claimant's circumstances will be at the renewal date. We do not accept that that is so. The suggestion in CIB/4751/02 et al., at paragraphs 106 and 107, that a renewal claim requires prediction was made without full argument and consideration of the implications of section 8(2)(b), and we consider it to be wrong.

19. In our judgment, applying sections 8(2) and 12(8)(b) to decision-making on those prospective claims permitted by regulations under section 5(1)(b) to (e) is perfectly consistent with sensible decision-making. There is nothing inherently unreasonable in requiring prospective claims to be determined on the basis of circumstances obtaining at the time of the decision and requiring further action, in the form of revision, supersession or a new claim, if circumstances change. On the contrary, there is much to be said for prohibiting speculation, which is what section 8(2)(b) does.

20. However, there is no element of speculation or prediction in the Secretary of State having regard to the effect on entitlement to benefit of the mere passage of time between the date of his decision and the renewal date. In our judgment, section 8(2)(b) does not preclude him from, for example, taking account of the fact that, by the renewal date, the three-month qualifying period for a particular rate of benefit will have elapsed or the claimant will have attained a certain age. Those are the inevitable consequences of there being no change in the circumstances obtaining at the time of the decision. That the effluxion of time is not a change of circumstances for this purpose is supported by the language of regulation 13A of the 1987 Regulations which permits a prospective award on an initial claim for disability living allowance where the Secretary of State is of the opinion that "*unless there is a change of circumstances* he *will* satisfy those requirements for a period beginning on a day ... not more than 3 months after the date on which the claim is made" (our emphasis). Also, nothing we have said should be taken to amount to disagreement with R(DLA) 3/01 in which Mr Commissioner Jacobs explored the way section 12(8)(b) of the 1998 Act operates on an appeal from the Secretary of State where he was not satisfied that it was "likely" at the date of his decision that the claimant would continue to satisfy the conditions of entitlement to disability living allowance for six months from the date of an initial award (see sections 72(2)(b) and 73(9)(b) of the Social Security Contributions and Benefits Act 1992).

The second issue

21. In reality, the opportunity for speculation would not arise very often even if the 1998 Act had not come into force. By their nature, most renewal claims for disability living allowance are made in respect of long-standing conditions, many of which are chronic and not likely to be subject to substantial variations in the six months before the renewal date. However, the possibility that there might be variations seems to have been one consideration that led Mrs Commissioner Brown to hold in C12/03-04(DLA) that the Secretary of State was not entitled to disallow a renewal claim before the renewal date. Mr Wright argued that we should follow Mrs Commissioner Brown's decision on this issue, whereas Mr Forsdick submitted that we should not.

22. Mrs Commissioner Brown's principal ground for deciding that the Secretary of State had no power to disallow a renewal claim until the renewal date was the lack of any power in section 5(1) of the 1992 Act or in regulation 13C to disallow a claim prospectively, whereas there are references to awards. We have already explained, in paragraph 16 above, that regulation 13C(2)(b) does not contain a power to make an award because the power to make an award is implicit in the duty to decide a claim, imposed by the 1998 Act. Equally, the power to disallow a claim is implicit in the duty to decide it. It follows that we disagree with Mrs Commissioner Brown's approach. We agree with Mr Forsdick that the duty to determine a claim imposed by sections 1 and 8(1) of the 1998 Act involves a duty to do so without

undue delay and, where the Secretary of State has no particular reason to anticipate that there will be a change of circumstances, we also agree with Mr Forsdick that it is to the advantage of a claimant as well as the Secretary of State that a decision to disallow a renewal claim should be made at the earliest possible date. That is because the claimant is then enabled to challenge the decision, just as he or she can where an award is made that he or she regards as inadequate. If authority is required, it can be found in R(S) 5/80, to which Mr Forsdick referred us, where a Tribunal of Commissioners held that similar regulations making provision for conditional awards to be made in advance did not preclude the making of disallowances in advance.

23. Mrs Commissioner Brown's second ground for deciding as she did was a view that there would be injustice unless a new claim were to be made. There would, indeed, be injustice if no new claim could be made, but as there is no injustice in requiring a new claim in a case where the Secretary of State had no reason at the time of his decision to suppose there would be a change of circumstances, we do not regard this as a reason for holding that the Secretary of State should never disallow a renewal claim until the renewal date.

24. We accept, however, that different considerations may apply in those few cases where the Secretary of State does have grounds for anticipating that there is likely to be a significant change of circumstances that will have an impact on the claimant's entitlement to disability living allowance at the renewal date. In some such cases, it may well be good practice to defer making a decision until it is known whether the change has materialised. Whether this is so in any particular case does not depend on whether the claimant's current circumstances would, in the Secretary of State's opinion, merit an award or a disallowance or whether the anticipated change is likely to increase or decrease the amount of benefit to which the claimant is entitled. More important may be the question whether the claimant has specifically relied on the anticipated change, which may perhaps be what Mrs Commissioner Brown had in mind in referring specifically to disallowances. On the other hand, it will always remain open to the Secretary of State to decide a claim immediately and either mark the file for consideration of revision or supersession later or to leave the claimant to apply for supersession or make a new claim (perhaps, in some cases, specifically drawing attention to that possibility), depending on the circumstances. We do not consider that the fact that the Secretary of State has not deferred the making of a decision is ever likely by itself to invalidate the decision because the claimant would always be entitled to apply for supersession or make a new claim. Furthermore, where the anticipated change of circumstances is an increase in the extent of the claimant's physical or mental disablement so that he or she may become entitled to benefit at a higher rate than the current award, it will not be necessary to defer making a decision much beyond a date three months before the renewal date, because the effect of sections 72(2)(a) and 73(9)(a) of the Social Security Contributions and Benefits Act 1992 is that such a change of circumstances does not have any impact on entitlement to benefit until three months has elapsed.

25. We also accept Mrs Commissioner Brown's suggestion that disallowing prospectively a renewal claim on the basis of the circumstances obtaining at the date of the decision will always raise the question whether the existing award should be superseded. However, that is equally the case where an award is made prospectively at a different rate from the existing award and so it does not justify taking different approaches to disallowances and awards. Further, as a view of a decision-maker that a different award is appropriate from the renewal date does not necessarily imply a ground for supersession of the existing award, supersession

will not always be appropriate, particularly where the new award is less favourable to the claimant than the old award.

26. Accordingly, while we see some force in Mrs Commissioner Brown's comments, we do not agree that they lead to the conclusion that the Secretary of State has no power to disallow a renewal claim prospectively and we therefore consider that C12/03-04(DLA) should not be followed.

27. We now turn to consider the individual appeals before us.

CDLA/2751/2003

28. From 26 July 2000 to 25 July 2002, the claimant, who suffered from serious back pain, was in receipt of disability living allowance comprised of the higher rate of the mobility component and the middle rate of the care component. On 7 March 2003, he made a renewal claim, which was disallowed on 30 May 2002. He appealed and, on 6 December 2002, the Sutton appeal tribunal allowed the appeal to the extent of awarding the higher rate of the mobility component from 26 July 2002 to 25 July 2004. Before the tribunal, the claimant sought the highest rate of the care component. The tribunal accepted evidence from a surgeon that the claimant was being investigated with a view to fusing part of his spine and that for a person to be considered for spinal fusion, their pain had to be severe and continuous. In relation to the care component, the tribunal effectively took the view that the claimant could cope and that the pain he suffered could not be relieved by assistance. For instance, when considering his ability to move about at home, they said:

> "The tribunal accepted that the pain on walking which led it to conclude that the appellant was virtually unable to walk would similarly impede his ability to move about inside his home. However, the question for the tribunal in this regard was whether the appellant had a reasonable need for attention from another person in relation to this activity. The appellant was a large, well-built man who would be far too heavy for any person to carry or physically support about inside the house. Accordingly, although the tribunal accepted his evidence as to the difficulty, it did not accept that attention from another person would assist, and was therefore not needed.

29. The claimant now appeals with the leave of a full-time chairman. For the reasons we have already given, we reject Mr Wright's submission that the Secretary of State's decision to disallow the claim before the renewal date was invalid. It is therefore necessary for us to consider the claimant's other grounds of appeal, which the Secretary of State supports. The claimant originally challenged the tribunal's decision on the ground that the fact that it was not physically possible to provide assistance to the claimant did not mean that assistance was not reasonably required by him. Despite the Secretary of State's apparent acquiescence in that approach, we do not accept it. A person cannot reasonably require assistance it would not be physically possible to provide. However, we accept Mr Wright's alternative submission that it is at least possible that the tribunal erred in having regard only to assistance that could be provided by one person without considering whether two people might realistically provide help that would reduce the pain suffered by the claimant. The singular "person" in section 72(1) of the Social Security Contributions and Benefits Act 1992 must be taken to include the plural. Further, the tribunal found that the claimant "had the physical ability to prepare a cooked main meal for himself" and, in the context of this particular case, that language at least

leaves open the possibility that they did not consider whether it was reasonable to expect him to cook a meal given the degree of pain that he might experience while doing so.

30. On those grounds, we are prepared to accept that the tribunal's decision is erroneous in point of law and to allow the appeal. We do so with some hesitation, because the tribunal plainly gave careful consideration to the case and the ambiguities in the statement of reasons do not necessarily suggest errors that affected the outcome. However, they do require the claimant's circumstances to be investigated further and, as claimant was not present at the hearing before us and Mr Wright did not have detailed instructions, we must refer the case to another tribunal.

CDLA/3567/2003

31. From 11 September 2000 to 10 September 2002, the claimant, who suffered from osteoarthritis, asthma and chronic bronchitis, was in receipt of disability living allowance comprised of the higher rate of the mobility component, on the ground that she was virtually unable to walk, and the lowest rate of the care component, on the ground that she was unable to prepare a cooked main meal for herself if she had the ingredients. On 22 July 2002, her renewal claim was disallowed. She appealed to the tribunal who dismissed her appeal on 13 June 2003. In relation to the mobility component, the tribunal relied on the claimant's own oral evidence to find that "she could walk a considerable distance, in excess of 50 yards, without the onset of severe discomfort". The oral evidence was summarised in the statement of reasons as follows:

> "The appellant attended the hearing with her representative. She confirmed that she had travelled on her own by bus from Skegness. We noted that the bus station was in excess of 100 yards from the hearing centre and the appellant had walked from the bus station although she had to stop to use an inhaler. The appellant indicated that she was still waiting to see a consultant regarding her arthritis. The appellant indicated that when walking she needs an inhaler. She indicated that it is rare if she goes into Skegness, her "shoulders and elbows are difficult". In relation to walking the appellant was asked how far she had to walk to catch the bus and she indicated that she walked 200 yards to the top of the lane but had to take a puff for her asthma."

32. The claimant now appeals with the leave of the Chief Commissioner. For the reasons we have already given, we reject Mr Wright's submission that the Secretary of State's disallowance of the renewal claim before the renewal date was invalid. The claimant's original grounds of appeal against the tribunal's decision, drafted by her local citizens' advice bureau, are directed solely at their conclusion as regards the mobility component. It is contended that the tribunal erred in ignoring "the fact that she uses the inhaler to recover from the severe discomfort of breathlessness" and that "[a]s the number of times [the claimant] has to stop is not known, the conclusion from the finding of fact from the evidence reported in the statement indicates that the decision made is not supported by the evidence recorded". The Secretary of State resists that ground of appeal, citing Mr Commissioner Levenson's decision in CDLA/16377/96, where he said:

> "The claimant has suggested that if she had to stop walking in order to inhale, that necessarily meant that she was in severe discomfort. However, that does not follow. The purpose of inhaling may be to avoid severe discomfort and if inhaling in a

> medically appropriate way can avoid severe discomfort, then it cannot be said that the relevant walking can be accomplished only with severe discomfort."

We agree. In the present case, the tribunal, who had a doctor among their members, were entitled to conclude that use of the inhaler did not indicate that the claimant suffered severe discomfort when walking in the circumstances she had described.

33. Notwithstanding that neither the citizens' advice bureau nor Mr Wright had argued the point, Mr Forsdick submitted at the hearing before us that the tribunal's decision was erroneous in point of law because the chairman did not record adequate reasons for their conclusion that the claimant was unable to prepare a cooked main meal for herself, given that her evidence was that "she does not cook meals because she had previously dropped a kettle and when her daughter or grandson is not with her she feels helpless". We note that the previous award had been based on the report of an examining medical practitioner who had stated that the claimant could not cope with hot pans and that the only cooker she could use would be a microwave oven. On the other hand, it is noteworthy that the claimant's claim form had said that her daughter did all the cooking because she herself had no confidence and because her legs would not stand up to it. This is consistent with the examining medical practitioner having found in 2000 that the claimant's osteoarthritis affected her back, hips and knees. The tribunal plainly took account of the claimant's evidence that she had a perching stool, had in fact cooked pork chops and could peel vegetables and it seems to us that they decided, and were entitled to decide, that the claimant could in practice have managed to cook without undue risk. It would have been better if the chairman had expressly recorded the decision in those terms but it is obvious that the tribunal had the evidence of the dropped kettle in mind, because reference is made to it in the statement of reasons, and it is equally obvious that there are ways of avoiding having to carry hot pans and to minimise the need to lift hot kettles. There was no evidence of such a weakness of grip or liability to fall that the claimant was really a danger to herself in the kitchen, however much she might have lost confidence, and there was no evidence that the lack of confidence reflected mental disablement. We reject Mr Forsdick's submission. The fact that the kettle had been dropped once did not, on the evidence in this case, suggest a propensity to drop it. We therefore dismiss the claimant's appeal because we are not satisfied that the tribunal's decision is erroneous in point of law.

CDLA/3725/2003

34. In this case, the claimant fractured his right leg and suffered complications that left him severely disabled. He had been entitled to the middle rate of the care component and the higher rate of the mobility component of disability living allowance from 25 October 1998 to 24 April 2003. In respect of the last two years, the award of the care component had been based on an assessed need for continual supervision throughout the day. On 13 November 2002, he made a renewal claim and on 18 December 2002, the Secretary of State decided to award the lowest rate of the care component and the higher rate of the mobility component from 25 April 2003 to 24 April 2005. By a letter received on 6 January 2003, the claimant sought reconsideration of that decision. He enclosed letters dated 13 December 2002 and 20 December 2002 showing that his medical advisers were contemplating amputating his leg below the knee and he appears also to have informed the Secretary of State of the expected date of his operation. Nevertheless, on 11 February 2003, the Secretary of State decided not to revise the decision of 18 December 2002. The amputation had been performed on 5

February 2003. The Secretary of State's view was that the claimant's condition would have improved by 25 April 2003 and that he would not require frequent attention in connection with his bodily functions by that date, notwithstanding the medical opinions suggesting he would have substantial personal care needs for at least six months after the amputation. On 5 March 2003, the claimant appealed, stating clearly that the lower part of his leg had been amputated. He subsequently produced evidence showing that in April 2003 he was still suffering from severe pain in the phantom limb and significant depression and that those problems were persisting at the date of the hearing on 23 July 2003. The tribunal dismissed his appeal. They said:

> "The decision on renewal was made on 18.12.02 and it was made clear that the Tribunal could not take into consideration any deterioration in his condition after that date except insofar as this could and should have been anticipated at the date of the renewal decision. At that date it was likely that there would be a need for amputation of his leg below the knee but it was anticipated that within two months or so of such amputation the Appellant's overall condition in relation to his attention and supervision requirements would have improved. The amputation was carried out on 5.2.03 but the Appellant's evidence was that the anticipated improvement had not occurred and, if anything, his condition had become worse in relation to his attention and supervision needs."

The claimant now appeals with the leave of the Chief Commissioner.

35. On 13 January 2004, the decision of the tribunal was superseded and the highest rate of the care component and the higher rate of the mobility component of disability living allowance were awarded for an indefinite period with effect from 6 May 2003. That appears to have been belated recognition of the fact that the Secretary of State's decision of 18 December 2002 should have been superseded in the light of the information provided in the course of the claimant's appeal to the tribunal. The effective date of the supersession is clearly based on a view that the claimant's increased need for attention in connection with his bodily functions arose only from the date of the amputation so that, by virtue of section 72(2)(a) of the Social Security Contributions and Benefits Act 1992, the claimant became entitled to the highest rate of the care component only three months later. The only period in issue before us is therefore the short gap from 25 April 2003 to 5 May 2003.

36. For the reasons we have given, we reject the submission of Mr Wright, supported by Mr Forsdick, that the tribunal erred in disregarding the actual effects of the amputation, which, at least in the short term, appears to have left the claimant worse off than anticipated. However, they erred in having regard to the effects of the amputation that they considered could reasonably have been anticipated, quite apart from the fact that they ascribed to the original decision-maker the views of the decision-maker who refused the revision on 11 February 2003. They ought to have had regard only to the claimant's requirements for attention and supervision on 18 December 2002. We can substitute our own decision. On the evidence in the renewal claim form, we are satisfied that the claimant required both frequent attention in connection with his bodily functions and continual supervision throughout the day but he did not then require prolonged or repeated attention or watching over at night. The bladder problem to which he referred when stating that he required repeated attention at night was not, at 18 December 2002, likely to persist so that the condition of section 72(2)(b) of the Social Security Contributions and Benefits Act 1992 would be satisfied and, judging from the

tribunal's findings, did not in fact do so. Consequently, we award the middle rate of the care component, in addition to the higher rate of the mobility component, in respect of the short period in issue.

37. We observe that this is a case where, on the revision application, the Secretary of State could properly have deferred his decision if he was not prepared to make an award at the current rate and to consider revision or supersession after the renewal date. We also observe that, if he had been of the view that the claimant's circumstances at the date of his decision warranted the highest rate of the care component from the renewal date, he might have been obliged to consider supersession of the current award which had more than three months left to run.

(Signed on the original) **HIS HONOUR JUDGE GARY HICKINBOTTOM**
Chief Commissioner

MARK ROWLAND
Commissioner

R. J. C. ANGUS
Commissioner

9 March 2004